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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 832

BEATRICE FOODS CO.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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THE GUNTHER-WAHLEN PRINTING COMPANY, CHICAGO

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The Brief in Opposition, at a time when the Department of Justice is resorting to criminal anti-trust prosecutions to an unprecedented degree so that a proportionate increase of appellate work in that field may be anticipated, asserts that this unusual case in which (a) the Government had two of the three asserted conspirators testify there was no conspiracy while the third stood mute, (b) the trial judge repeatedly directed or authorized conviction on charges wholly outside the indictment which the prosecutor claimed he had proved, and (c) the Court of Appeals affirmed *without once considering whether the evidence was sufficient to convince beyond a reasonable doubt in the face of its admission* (Pet. p. 49) that *"the case was not a strong one"* and that it *would have been "possible . . . to decide the issue otherwise"* (Pet. p. 50) presents no substantial question warranting review. That is true only if

this Court is to approve lower standards in anti-trust prosecutions than it insists on in ordinary *malum in se* prosecutions.

Although the Brief in Opposition asserts (n. 3, p. 5) the Court of Appeals "expressly applied the proper standard (see Pet. 44)," the indubitable fact is that it did not. All that the Court of Appeals did at Pet 44 was to state the truisms that it was to consider the evidence in its most favorable aspect to the Government and that a conviction could rest upon circumstantial evidence. Nowhere did the Court of Appeals find or say that the evidence was sufficient to convict beyond a reasonable doubt. Instead, it created a new test. The evidence must be "affirmatively adverse" (Pet. 49) to the prosecutor's contention if there is to be an acquittal. This is a wholly new phrase in criminal law and warrants full examination.

The brevity of this Reply is not to be taken as a concession that there are not other serious faults in the Brief in Opposition. Each point in the Petition, we believe, is wholly valid.

We respectfully suggest the case presents grave questions of national importance.

Respectfully submitted,

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